

February 25, 2007

The Honorable John Nygren
Room 127 West
State Capitol
P.O. Box 8953
Madison, WI.
53708

Dear Representative Nygren;

I am looking for some help in trying to obtain a legal opinion from the Wisconsin Attorney General office. This would be a legal opinion on whether: "May a municipal governing body member waive his or her annual salary"?

Background:

I was appointed in May of 2004 to full-fill the un-expired term of a City of Oconto Alderman who had moved out of the city. At this point in time I waived any form of payment for my time in office. I ran for election in 2005 and lost. Shortly after the election a Alderman resigned and moved out of the city. I again, was asked to full-fill the un-expired term which I did. I again refused any form of payment. I am on the ballot for Alderman for the election in April of 2007.

In the April election of 2002 I ran for Oconto County Supervisor for district fourteen and won. I also ran for re-election in 2004 and 2006 for this same position and won. I waived any form of payment from my first day in office and I still do not want any form of payment for holding these two offices. This also applies to payment for committee meetings. The only payment that I would like to be reimbursed for is my out of pocket expenses. So far, for my time in both offices, this sum has amounted to less then seventy five dollars.

The City of Oconto has informed me that I must take payment of moneys for my term in office in the future. They are basing their reasoning on a opinion supplied by Mr. Curt Witynski Assistant Director League of Wisconsin Municipalities. Mr. Witynski is using a opinion from April 21, 1970 from (Mrs.) Jean G. Setterholm Assistant Legal Council. This opinion has a title of "Salaries # 378". References cited in this document go back to 1874 through 1940. This opinion was asked for by the President of the Common Council of the City of Oconto Wisconsin and obtained by the Oconto City Clerk.

One of the reasons stated in the above document, is that a person may take the payment and donated it back to the local government. Back in 1940 and before we did not have the type of taxes that we do now. With taxes not coming into being until late twenty's,

excluding the tax that was established to pay for the Civil war, this might have been a appropriate response. With the tax laws and the checks and balances that are in place today, for government, I believe that this is a out of fashion idea. If a person today, would do as suggested, they may have to end up paying for the right to volunteer.

Can any city, county, school district, hospital etc. afford to be with out volunteers? With volunteers helping out in library's, hospitals, blood banks, schools, food pantries, and hundreds of other types of jobs that have to be done in less then a eight hour period where do you think we, as a country, would be?

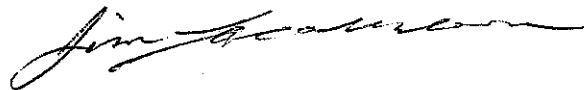
My reasoning for not accepting the moneys is as follows:

1. I do not need the money.
2. The city and county's are under a budget restraint.
3. Moneys saved will lower property taxes for every one.
4. There is no state statute that requires me to take this money.
5. There is no Administrative law that requires me to take this money.
6. There is a president set for election officers that they may refuse payment (state statute (7.03 (1) (a)) If they can do it why not elected officials?
7. United States Senator Herb Kohl, a elected official, refuses payment for his \$162,100 a year job as a United States Senator. If he can do it, why can't I?
8. City's, counties, and school boards may be able to have more people run for elected offices if a positive ruling is obtained.
9. To my way of thinking, I am volunteering to my city and county and volunteers, in most cases, do not receive compensation for their time.
10. President Kennedy asked in one of his speech's "Ask not what your country can do for you, but what can you do for your country". I think that this is very appropriate for this request.

Conclusion:

I would greatly appreciate any help that you can give me in obtaining a legal ruling on this issue from the Wisconsin Attorney Generals office. This will help the city and county along with the school board to have a guideline to work with for volunteers.

Respectfully;

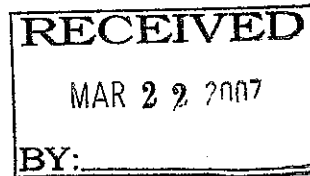


Jim Lacourciere
317 Madison St.
Oconto WI. 54153

cc Senator David Hansen, Wisconsin Department of Justice

enc salaries #378

Representative John Nygren
89th Assembly District
P.O.Box 8953
Madison, Wisconsin
53708-8953



March 20, 2007

Dear Representative Nygren;

Thank you for your reply to my letter of February 25, 2007 in regards to payment for elected officials. I also wish to thank you for fore-warding it to the Attorney Generals office. By your efforts I was able to get a reply from them. I am enclosing a copy of their reply for your information.

In their reply to me by F. Thomas Creeron III Assistant Attorney General it sounds like the biggest concern, at this point in time, is that a elected official may start a law suit for back pay even though they did not want to receive payment initially. This being the case and seeing that a law all ready exists allowing election officials to forgo or renounce all or part of their salary as shown below under 7.03(1)(a).

(a) Except as authorized under this paragraph, a reasonable daily compensation shall be paid to each inspector, voting machine custodian, automatic tabulating equipment technician, member of a board of canvassers, messenger, and tabulator who is employed and performing duties under chs. 5 to 12. Daily compensation shall also be provided to inspectors and inspector trainees for attendance at training programs conducted by the board and municipal clerks under ss. 7.31 and 7.315. Alternatively, such election officials and trainees may be paid by the hour at a proportionate rate for each hour actually worked. Any election official or trainee may choose to volunteer his or her services by filing with the municipal clerk of the municipality in which he or she serves a written declination to accept compensation. The volunteer status of the election official or trainee remains effective until the official or trainee files a written revocation with the municipal clerk).

would it be possible and would you be willing to introduce such a change in the Assembly? It might even be possible to just add in "local elected officials" into the above statute.

I was contacted by telephone by one of Senator Dave Hansen aid's in regards to this situation. I have not heard back from his office since the original contact but I will be sending him the same information that you are receiving here. I will also be asking him if he would be willing to introduce legislation in the State Senate for this change.

In my previous letter I stated ten different reasons, that in my opinion, is why we should have this type on legislation. Those reasons have not changed and in light of the up-coming budget have even gotten stronger. We need more people to get involved and with both partners in a marriage working, in order to make ends meet, this does not leave too

many people to chose from. Those of us who are retired have the experience of "our years on earth" and our past life experiences to help us in these endeavor's. I believe that it is not fair to exclude this vast area of expertise because of monetary considerations. With the "baby boomers" coming of age this pool of knowledgeable people is going to be growing by leaps and bounds. If we do not make arrangements to have these people available for public office we will be depriving our grandchildren and great grandchildren of a valuable resource.

Thank you for your help in this matter.

Jim Lacourciere
317 Madison St.
Oconto WI 54153
920-834-4684
luke61@ez-net.com





STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

F. Thomas Creeron III
Assistant Attorney General
608/266-8549
creeronft@doj.state.wi.us
FAX 608/267-2223

March 14, 2007

Mr. Jim LaCourciere
317 Madison Street
Oconto, WI 54153

Dear Mr. LaCourciere:

Your letter dated February 25, 2007, has been referred to me for reply. Your letter and accompanying materials indicate that you are running for the office of alderman in the City of Oconto. You have previously served as an alderman and as a county supervisor and commendably have foregone your salary for both positions. You were recently advised by the City of Oconto that, if you are elected as an alderman, you must accept your salary but you may donate your salary back to the city if you so choose. The city relies upon a 1970 opinion issued by Jean Setterholm, who at that time was an attorney for the League of Wisconsin Municipalities ("League"). You have enclosed a copy of that opinion with your letter. You disagree with the opinion for at least ten different reasons. You therefore request "a legal ruling on this issue from the Wisconsin Attorney Generals office."

The Attorney General issues legal opinions to the Governor, the Legislature, state officers and state agencies. It is not his practice to issue opinions to current or prospective municipal officials, and regardless he would be reluctant to provide an opinion upon matters with respect to which such officials have obtained legal advice from other sources such as a city attorney or an attorney for the League.

I can say that no statute prohibits a municipality from permitting a public officer to forego or renounce all or part of his or her salary. However, courts in many states including Wisconsin have developed the doctrine that "an agreement by an officer to accept a less sum than the prescribed salary of an office is void, as against public policy, and the officer is not precluded from recovering, in an appropriate action brought for that purpose, the full amount of compensation due." 4 McQuillin, *Municipal Corporations* § 12.191 (footnote omitted). Since a municipality may not want to risk future lawsuits or future liability because of the existence of this common law doctrine, it may legitimately require that the public officer accept his or her salary and then donate a like amount back to the municipality.

Mr. Jim LaCourciere
March 14, 2007
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Law made by courts is referred to as "common law." The Legislature can change the common law by enacting a statute, as it has done in section 7.03(1)(a) of the Wisconsin Statutes where it has expressly authorized certain voting or election officials to forego or renounce compensation to which they would otherwise be entitled. The Legislature could choose to enact a similar statute expressly authorizing any municipal elected official to forego or renounce all or part of his or her salary. The enactment of such a statute would eliminate any potential risk to the municipality that the common law doctrine might be applied where a municipal elected official voluntarily chooses to forego or renounce all or part of his or her salary.

You express the very legitimate concern that the tax consequences of refusing to accept a municipal salary are far different than the tax consequences of accepting a municipal salary and then donating a like amount back to the municipality. Despite that concern, given the current state of the common law in Wisconsin I cannot say that the City of Oconto's advice to you as to how it will proceed if you are elected alderman is unreasonable.

I hope this information is helpful.

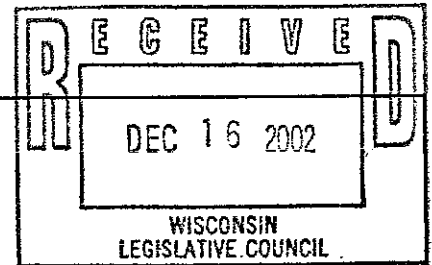
Sincerely,

A handwritten signature in cursive script that reads "F. Thomas Creeron III". The signature is written in dark ink and is positioned above the printed name.

F. Thomas Creeron III
Assistant Attorney General

FTC:cla

**A
LEAGUE
MANUAL**



Handbook for Wisconsin Municipal Officials

*League of Wisconsin Municipalities
202 State Street, Suite 300
Madison, Wisconsin 53703
2002*

1. changes may be made at or before the first regular council meeting in February to take effect at the beginning of the term that spring for elected officers and appointed officers serving definite terms;
2. for these officers, changes may be made at any time during the second (or later) year of the term to take effect at any time during such second or later year of that term; and
3. appointed officers serving indefinite terms may have their salaries increased at any time, since there is no applicable statutory restriction. League opinion Salaries 405.

The conclusion for (2) above is based in part on legislative history. At one time sec. 62.09(6)(b), Stats., included this sentence: "The salary of an officer so elected shall not be increased or diminished during his term of office." The sentence was deleted by Ch. 24, Laws of 1967. The Legislative Reference Bureau analysis to the bill which deleted this sentence explained that the bill would allow elected officers, other than members of the governing body, to receive mid-term increases, as is the case with appointed city officers (1967 Senate Bill 61). Since the statute clearly limits salary changes for elected city officers and officers appointed for a definite term, the League has worked out the above interpretation to give meaning to the statute in light of the legislative history.

In a related matter, automatic cost-of-living increases may be made for municipal employees and officers, except for members of the governing body. Sec. 66.0507, Stats.

The question sometimes arises as to whether governing bodies can reduce their salaries mid-term. Village boards cannot reduce their salaries mid-term. Common councils may be able to do so. Section 61.32, Stats., expressly provides that village board members' salaries may not be reduced mid-term. There is no similar statutory prohibition with respect to city governing body members. Language prohibiting the reduction of city officers' salaries was deleted from sec. 62.09(6)(b), Stats., in 1967. This implies that common councils may reduce city officers' salaries mid-term.

However, there is some question regarding whether the salaries of municipal officers who have been elected or appointed for a definite term may be reduced mid-term. League legal staff has said in past legal opinions that an elected municipal officer is not under contract with the municipality but acquires his or her position by election and is entitled to the salary of the office provided by the ordinance in effect at the time he or she enters office. To conclude otherwise would mean that a governing body would be able to reduce the salary of an elected officer during the middle of the officer's term for political or other reasons. League legal staff cautions against mid-term decreases since such an action risks inviting litigation.

Another question which sometimes arises is whether a municipal governing body may establish a range of salaries for municipal officers based on the number of years an incumbent has served in office. A compensation scheme which is based upon an elected incumbent's performance or length of service is of questionable legality. The Wisconsin Attorney General has concluded that a county board lacked authority to establish a range of salaries for elected county officials based on performance or length of service. The attorney general reasoned that compensation must be attendant to the office, not the personal characteristics of the individual that holds that office at any particular time. 80 Op. Att'y Gen. 258 (1992).

Another question League legal staff occasionally receives is whether a municipal governing body member can waive his or her annual salary. A governing body member may not unilaterally waive his or her annual salary but there is no legal impediment to a governing body member making a gift of such salary to the municipality. See *Coughlin v. Milwaukee*, 227

Wis. 357, 368 (1938). The basis for the rule prohibiting waiving one's salary is that it is against public policy for a person to barter or trade for public office. However, nothing prohibits a municipal officer from donating his or her salary to the municipality. If such a donation is accepted by the municipal governing body, the member may not later sue for its return on the grounds that the gift constituted an illegal reduction in the member's official compensation. See League opinion Salaries 378 for a comprehensive discussion of this issue.

One final note on governing body salaries. The state ethics law for local officials does not prohibit governing body members from voting to increase their own salary, benefits and/or expense reimbursements. An exemption in the state code of ethics for local officials allows local public officials to take action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses without violating the state ethics code. Sec. 19.59(1)(d), Stats.

FRINGE BENEFITS

"Salary" does not include "fringe benefits," such as retirement plans, deferred compensation plans and health insurance coverage. *State ex rel. Manitowoc v. Police Pension Board*, 56 Wis.2d 602, 203 N.W.2d 74 (1973); 70 Op. Att'y Gen. 266 (1981). Thus, retirement and insurance benefit increases are not subject to the prohibition on mid-term salary increases. There is explicit statutory language providing that the "payment of premiums for hospital, surgical and other health and accident insurance and life insurance for employees and officers and their spouses and dependent children" is authorized and "nothing in the statutes is to be construed to limit the authority of ... municipalities ... to provide for the payment" of these premiums. Sec. 66.0137(5), Stats. The League has opined that this allows providing mid-term insurance coverage or changes. League opinion Salaries 416.

Similarly, another relevant statute provides that a municipal governing body may decide to increase the amount it pays under the Wisconsin Retirement System "at the time and in the form determined by the governing body...." Sec. 40.05(1)(6), Stats.

EXPENSE REIMBURSEMENTS

Expense allowances are also not considered "salary" and hence are not subject to the mid-term increase restriction. An expense is a charge incurred in performing one's official duties. *Geyso, supra*, 34 Wis.2d at 483.

It is common for municipal governing body members in Wisconsin to be paid a certain amount on a per-meeting basis. The question arises as to whether such payments constitute per-meeting expense reimbursements or "salary." In order for a payment to be considered an expense reimbursement and not salary, the payment must be reasonably related to the actual expenditures incurred. In other words, just calling a monthly or per-meeting payment "expense reimbursement" does not make it such if the amount is not reasonably related to the costs incurred. *Geyso, supra*, 34 Wis.2d 486-487.

If the payment exceeds actual costs, it could be considered salary. However, an expense reimbursement need not be made by voucher for itemized claims, but instead can be a fixed amount which the governing body determines reasonably approximates actual expenses. *Id.*

In *Geyso*, the court upheld the legality, under secs. 62.09(6)(b) and 66.0505, Stats., of a city ordinance which provided for a reasonable monthly expense allowance. The court examined the legality of reasonable expense allowances paid in a monthly lump sum, for which no itemization of expenses was required to be filed, and concluded that "an appropriation in gross" will be upheld if it is "within such reasonable limits as to warrant the conclusion that

April 21, 1970

Village Attorney William F. Reilly
Village of Sussex
P. O. Box 13
Waukesha, Wisconsin 53186

Dear Mr. Reilly:

You ask whether a village trustee may waive his annual salary. Your question arises from the following set of circumstances:

The trustee in question promised during his campaign for office to waive his official salary if elected. After his election he consistently maintained his intent to make such a waiver. Trustees in your village are paid an annual salary and the first year of this trustee's term is now finished and he has requested the clerk not to issue an order for payment of his salary. The clerk has made regular withholding deposits covering the salary of this individual, but no payments have been made to the Wisconsin retirement fund, since elected officers in your village are not covered by the fund. No formal action has ever been taken by the village board to accept the waiver of salary by this trustee. The trustee is receiving social security benefits and does not desire the additional income.

In this state "a vote given for a candidate for a public office in consideration of his promise, in case he shall be elected, to donate a sum of money or other valuable thing to a third party, whether such party be an individual, a county, or any other corporation, is void." [State ex rel. Newell v. Purdy (1874), 36 Wis. 213]. Such a promise would also appear to violate the state corrupt practices act [s. 12.50; 21 Ops. Atty. Gen. 774 (1932)]. Since no challenge was made concerning the legality of the election of this trustee, the only significance of the above legal rules would appear to be the unavoidable conclusion that there is no binding agreement between the village and this trustee whereby he can be precluded from accepting a salary as provided by the applicable village ordinance.

Section 61.32 of the statutes provides for payment of salaries to the president and trustees of a village as follows:

"The president and board of trustees of any village . . . may by a three-fourths vote of all the members of the village

April 21, 1970

board determine that an annual salary be paid the president and trustees. Salaries heretofore established shall so remain until changed by ordinance and shall not be increased or diminished during their terms of office."

The majority view in this country is that acceptance by a public officer or employe of less compensation than fixed by law is void [160 A.L.R. 490 (1946), Annotation: Public Officers--Compensation. "Validity and effect of agreement by public officer or employee to accept less than compensation or fees fixed by law, or of acceptance of reduced amount."]. The rule is based on the reasoning that it is against public policy for a person to barter or trade for public office or employment. However, some courts, including Wisconsin, have sustained agreements by public officers to accept less than legal compensation by applying the doctrines of waiver, estoppel or donation.

The Wisconsin supreme court passed upon the validity of reduction of salaries of public officers during their terms numerous times during and immediately following the years of the so-called "Great Depression" with varying results.

Since earlier cases had established the rule that the salary of a public officer could not be made a matter of contract or an officer estopped from accepting less than the salary allowed by law by an accord and satisfaction, the court found it necessary to fashion another doctrine to rationalize its approval of numerous instances of reductions in salaries of public officials by mutual agreement during those years of economic difficulties [Nelson v. City of Superior (1901), 109 Wis. 618; Rettinghouse v. City of Ashland (1900), 106 Wis. 595; Clarke v. Milwaukee Co. (1881), 59 Wis. 65]. The rationale devised by the court was that the rule against acceptance of a lesser salary than that allowed by law could be overcome or circumvented by a voluntary contribution to the public treasury [Schuh v. Waukesha (1936), 220 Wis. 600, at 604; Eck v. Kenosha (1938), 226 Wis. 647; Coughlin v. Milwaukee (1938), 227 Wis. 357; Connor v. Chippewa Falls (1938), 228 Wis. 102; Maxwell v. Madison (1940), 235 Wis. 114].

As long as the waiver or contribution was not obtained by coercion or duress, the actual mechanics of the contribution were held in these "depression" cases to be immaterial and the new rule was enunciated in Coughlin v. Milwaukee, at p. 368, as follows:

"It is not against public policy, in times of great public distress or otherwise, for a municipal or state officer or employee to donate to his city, county, or state such part of his salary or emoluments of office as he sees fit to contribute for the relief of the municipality or state. While his salary may not be diminished, except under certain conditions, he can do what he will with his own, and if he chooses to devote part of it to the city or state, and the latter accepts the same, no public policy forbids it. . . ."

Application of the above legal decisions and rules to the circumstances you have described in my opinion results in the conclusion that the village clerk must draw an order on the village treasurer for payment of

Reilly, Sussex

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April 21, 1970

the annual salary to the trustee in question. Without action on the part of the village board formally accepting the contribution of a trustee's salary for village municipal purposes, the law in this state requires payment in accordance with the salary ordinance adopted prior to his term of office. Mere acceptance of a lesser salary by the trustee would not be legally sufficient to estop him from later suing for his full salary.

My opinion does not, however, preclude the acceptance by the village board of a donation or gift to the village by the trustee in question of the entire amount of the annual salary to which he is legally entitled. Income, social security or other tax or benefit treatment of such a gift is a matter to be decided between the trustee and proper authorities.

Very truly yours,

(Mrs.) Jean G. Setterholm
Assistant Legal Counsel

JGS:AP
cc clerk

SALARIES # 378

Trustee may not unilaterally waive annual salary, but there is no legal impediment to his making a gift of such salary to the village. If such donation is accepted by the village board, the trustee may not later sue for its return on the grounds that the gift was illegal reduction in his official compensation.